

Adjudicating Human Rights in the ECOWAS Court: Challenges and Prospects

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Abstract

The ECOWAS Court has been heralded as a pacesetter among African regional courts because of its impact on human rights adjudication. Its outstanding work gained global recognition in March 2022, when Columbia University in the United States awarded it the Global Freedom of Expression Award. Nonetheless, the Court faces some challenges that slow down its advancement of human rights in the West African sub-region. This paper set out to achieve two things: to identify the challenges with adjudicating human rights in the ECOWAS Court and highlight the Court's prospects in dealing with human rights cases. It finds, among other challenges, that the current court structure and the 70 per cent non-compliance rate are significant limitations facing the Court. The adoption of the COVID-19-induced virtual hearings is also among other prospects that can be harnessed for more significant impact. The paper draws from the examples and experiences of other sub-regional and regional courts and tribunals to recommend how the ECOWAS Court can effectively adjudicate human rights.

Keywords: *Adjudication, Compliance, ECOWAS Court, Human Rights.*

1. Introduction

The ECOWAS Court - initially set up to interpret an economic treaty¹ now has human rights adjudication at the centrepiece of its judicial activities when it was given a human rights mandate in 2005. Justice Edward Amoako Asante, the Court's current President, stated that about 90% of the cases that go to the ECOWAS Court are human rights cases.² The Court is arguably one of the most progressive sub-regional courts in adjudicating human rights in Africa. For example, when it comes to temporal jurisdiction, the Court allows human rights cases to be filed by individuals against states without having to exhaust all local remedies first.³ To further enhance the accessibility of West Africans, the ECOWAS Court since 2007 has undertaken itinerant adjudication of cases by moving away from its headquarters in Abuja, Nigeria, to other member states from time to time.⁴ At the height of the COVID-19 pandemic, the Court adopted some technological interventions, and its intention to launch a proper electronic case management system is laudable.⁵ These mechanisms enhance access to justice to the ECOWAS Court - a fundamental right to enforce all other human rights.

Nonetheless, the Court's execution of its human rights mandate is not flawless. The limited number of judges assigned to the Court, the competing competencies between the ECOWAS Court and national courts, and the enforcement of the Court's judgments are some notable challenges that confront it. As of May 2022, the Court had a non-compliance rate of 70 per cent.⁶

Given this background, two aims drive this paper. First, to identify the challenges with adjudicating human rights in the ECOWAS Court to make recommendations on how to effectively address them by drawing lessons from other sub-regional and regional courts' examples and experiences on the continent. Second, to highlight the Court's prospects in dealing with human rights cases to harness them for even more progressive processes. The paper's findings are helpful to four key stakeholder groups: the ECOWAS Court as the object of study, litigants as users of the Court, academics interested in generating scholarship on the Court, and the international community as observers of the Court. The paper is organised as follows: part two gives a brief overview of the ECOWAS Court's human rights mandate. Part three discusses the challenges facing the Court. Part four deals with the Court's prospects. Part five proposes some recommendations based on the challenges identified and the observed prospects. Part six concludes the paper.

¹ Revised Treaty of the Economic Community of West African States (ECOWAS), 1993 art. 15.

² Manasseh Azure Awuni, 'ECOWAS Court to Hear 60 Cases, Deliver 25 Judgements in Ghana' (*The Fourth Estate*, 17 March 2022) < <https://thefourthstategh.com/2022/03/17/ecowas-court-to-hear-60-cases-deliver-25-judgments-in-ghana/> > accessed 3 April 2022.

³ Maame Efua Addadzi-Koom, 'Of women's rights jurisprudence of the ECOWAS Court: The Role of the Maputo Protocol and the Due Diligence Standard' (2020) 28 (2) *Feminist Legal Studies* 155 <<https://doi.org/10.1007/s10691-020-09432-4> > accessed 5 April 2022.

⁴ Awuni (n 2 above).

⁵ 'ECOWAS Court Practice Directions on Electronic Case Management and Virtual Court Sessions' (ECOWAS Court, 2020) < http://www.courtecowas.org/wp-content/uploads/2020/05/PD_ENG.pdf > accessed 5 April 2022. 'New Case Management System For Ecowas Court to Become Operational in January 2021' (ECOWAS Court, 2021) < <http://www.courtecowas.org/2020/11/23/new-case-management-system-for-ecowas-court-to-become-operational-in-january-2021/> > accessed 5 April 2022.

⁶ Speech delivered by ECOWAS Court President, Mr. Edward Amoako Asante, at the ECOWAS 2022 Conference in Cape Verde. <https://www.youtube.com/watch?v=dyptpcumEs8&t=3736s> (accessed 12 July 2022).

2. The Human Rights Mandate of the ECOWAS Court

The ECOWAS Court is the principal judicial organ of the ECOWAS community. As mentioned earlier, the ECOWAS Court's original mandate was to deal with member states' compliance with the economic treaties and instruments of the ECOWAS.⁷ Therefore, the Court, which was set up in 1991⁸ did not have a human rights mandate until about 15 years later, in 2005.⁹ The 2005 Supplementary Protocol amended the 1991 Protocol establishing the Court and clothed the ECOWAS Court with jurisdiction over human rights violations in any Member State.¹⁰ The Supplementary provides that allegations of human rights violations brought before the ECOWAS Court should not have been instituted before another international court.¹¹ Individuals seeking relief for applications of human rights violations cannot do so anonymously.¹² Though the human rights mandate of the Court was initially a 'legislature-driven' mandate,¹³ it seemed to have turned into a *judiciary-driven* one after the Supplementary Protocol was introduced. The turn to a judiciary-driven human rights mandate is because apart from these few stated provisions in the 2005 Supplementary Protocol on the Court's human rights mandate, there is no other protocol detailing the nature and scope of its human rights mandate neither is there a human rights charter assigned explicitly to the Court.¹⁴ Thus, the Court, through its decisions, has particularized its human rights mandate.¹⁵ For instance, the Court uses all international human rights instruments to which the Member States are parties as its source of human rights laws.¹⁶ Although, the Court's subject matter jurisdiction is grounded in the African Charter on Human and Peoples' Rights which is the fundamental charter for the ECOWAS human rights system.¹⁷ Also, the Court does not admit applications that do not state the clear human rights violation alleged.¹⁸ Furthermore, the Court does not admit human rights violations that are not of an international character.¹⁹ A unique attribute of the ECOWAS Court that facilitates access is the waiver of customary international law rule to exhaust local remedies.²⁰ Thus, persons seeking to submit their applications for human rights violations to the ECOWAS Court are not barred simply because they have not run through all remedies available in their home country.

Conferring the ECOWAS Court with a human rights mandate has had a revolutionary effect on the Court's activities.²¹ Records show that from 2001 to 2004 before Supplementary Protocol came into force, the Court had

⁷ Protocol A/P1/7/91 on the Community Court of Justice art 9.

⁸ Revised Treaty 1993 (n 1 above) art 15.

⁹ 2005 Supplementary Protocol A/SP.1/01/05 art 3(4). The 2005 Supplementary Protocol amended the 1991 protocol.

¹⁰ As above.

¹¹ 2005 Supplementary Protocol (n 9 above) art 4(d).

¹² As above.

¹³ S T Ebobrah 'Critical issues in the human rights mandate of the ECOWAS court of justice' (2010) 54(1) *Journal of African Law* 1 8.

¹⁴ Maame Efuia Addadzi-Koom "He beat me, and the state did nothing about it": An African perspective on the due diligence standard and state responsibility for domestic violence in international law' (2019) 19 *African Human Rights Law Journal* 624.

¹⁵ As above.

¹⁶ *SERAP v Federal Republic of Nigeria* ECW/CCJ/ JUD/18/13 para 28.

¹⁷ Addadzi-Koom (n 3 above). Revised Treaty 1993 (n 1 above) art 4(g).

¹⁸ *Musa Leo Keita v The Republic of Mali* ECW/CCJ/JUD/03/07.

¹⁹ *Peter David v Ambassador Rolph Uwechue* ECW/CCJ/RUL/03/10.

²⁰ *Prof Moses Essien v The Gambia* ECW/CCJ/APP/12/11 (2012) para 31.

²¹ Ebobrah (n 13 above).

heard only one case lodged in 2003.²² However, within three years after exercising its human rights mandate, 36 cases had been lodged at the Court as of March 2008, 13 judgments were delivered, four cases had been argued and were awaiting judgment, and 12 cases were pending (some part heard, others in the written procedure phase).²³ This remarkable progress in the judicial activities of the Court has continued to date. As of November 2021, a total of 559 cases had been lodged before the Court since its inception, 130 rulings had been given, and 301 judgments delivered – an overwhelming majority of which are human rights cases.²⁴ Undoubtedly, the expanded jurisdiction of the ECOWAS Court to adjudicate human rights cases has boosted the Court's appeal to its eligible users. Nonetheless, the Court's human right mandate is not flawless. Some of the challenges are discussed next.

3. Challenges

a. Old structure, new mandate

While the ECOWAS Courts' mandate had been expanded to include original jurisdiction over human rights matters, there was barely any corresponding restructuring of the court – a situation Ebobrah described as new wine (new jurisdiction) in old skin (same structure, composition, and procedures).²⁵ The *old structure, new mandate* situation of the Court puts into question its competence and credibility as an international court fit to handle human rights issues effectively. As a court initially intended to settle disputes relating to economic integration within the ECOWAS, the finality of its decisions on such matters and its immediate enforceability fit that purpose.²⁶ The Court does not have any legal (hegemonic) relationship with the national courts of Member States²⁷ and does not sit as an appellate court or a court of cassation within the ECOWAS legal system.²⁸ With the waiver of the exhaustion of local remedies, the court also sets itself up as a court of first instance for applicants

²² That one case was *Olajide Afolabi v Federal Republic of Nigeria* ECW/CCJ/JUD/01/04. The judgment delivered on 27 April 2004 struck out the case for want of jurisdiction because individuals at the time did not have direct access to the Court under article 9(3) of the 1991 Protocol ECOWAS treaty.

²³ Tony Anene-Maidoh 'Remarkable progress in the judicial activity of the ECOWAS court' (2008) 1 *Court Bulletin* 15. Fifteen cases were consolidated into one on 13 March 2007, while two cases were also consolidated on 10 November 2006.

²⁴ Speech delivered by ECOWAS Court President, Mr. Edward Amoako Asante, at the ECOWAS 2021 Conference in Lome, Togo.

²⁵ Ebobrah (n 13 above).

²⁶ As above. See also Protocol A/P1/7/91 art 19(2). *Jerry Ugokwe v. Nigeria* ECW/CCJ/APP/03/05 para 32, where the Court confirmed its status as the first and last court in community law.

²⁷ Ugokwe (n 26 above), para 32 (stating that 'And, if the obligation to implement the decision of the Community Court of Justice lies with the national courts of Member States, the kind of relationship existing between the Community Court and these national courts of Member States are not of a vertical nature between the Community and the Member States, but demands an integrated Community legal order'. Ebobrah (n 13 above). Despite the lacking legal relationship between the ECOWAS Court and national courts, the Supplementary Protocol of 2005 imposes a reference jurisdiction on the ECOWAS Court for cases involving interpretation of the ECOWAS Treaty, other Protocols, and Regulations. Therefore, national courts can refer such cases to the ECOWAS Court: 2005 Supplementary Protocol art 4(f).

²⁸ Ugokwe (n 26 above) (where the Court stated that hearing appeals is not part of its powers because '[t]he ECOWAS Court of Justice is not a Court of Appeal or a Court of cassation'). This position was confirmed in *Moussa Leo Keita v State of Mali* ECW/CCJ/APP/05/06, para 30 ('Unlike other international courts of justice, such as the European Court of Human Rights, the Community Court of Justice, ECOWAS, does not possess, among others, the competence to revise decisions made by the domestic courts of Member States; it is neither a court of appeal nor a court of cassation (*cour de cassation*) vis-a-vis the national courts...').

who bypass their national court system. Indeed, the Court has declared that ‘the distinctive feature of the Community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in Community Law’.²⁹

The ECOWAS Court’s simultaneous structure as a final arbiter and a court of first instance, which is neither an appeal nor cassation court because it has no close relationship with the Member States’ national courts, limits its human rights mandate. First, for human rights applications that come to the ECOWAS Court as the court of first instance, the Court’s decision will be final, and there will be no right of appeal.³⁰ Second, where a human rights case had been instituted before the national courts, the matter cannot be brought before the ECOWAS Court since it is not an appellate court unless the issues brought before the ECOWAS Court was not part of those previously heard at the national level.³¹ Finally, cases seeking remedy for the right to a fair trial could be excluded from coming to the ECOWAS Court because it is not an appellate court.³²

3.2 Qualification for judges

The qualification for judges for the ECOWAS Court, among other things, requires judges to be competent in international law, particularly in Community law or Regional Integration.³³ The requirements do not mention expertise in international human rights – another appendage of the *old structure, new mandate* situation. For a supranational court like the ECOWAS Court with a human rights mandate, such an omission in the qualification of judges who are 90% of the time faced with human rights issues is disquieting. Ebobrah notes that the global know-how in human rights ‘would prompt the sort of in-depth analysis of human rights issues that international courts need if their decisions are to be taken seriously’.³⁴ Thus, the missing requirement of competence in international human rights for judicial appointees to the ECOWAS Court casts doubts on the quality and robustness of the Court’s human rights jurisprudence.

3.3 Number and tenure of judges

Another challenge facing the ECOWAS Court in connection with its judges is their limited number and tenure. In 2018, the number of judges on the ECOWAS Court was reduced from seven to five.³⁵ Commenting on the crippling effect of this reduced composition of the Court, the President of the Court, Mr. Asante, mentioned that the increasing court caseload makes it difficult for the Court to cope with just five judges.³⁶ An added challenge was that with just five judges, the court could not split itself into multiple chambers to handle the piling cases since a court chamber requires a minimum of three judges to be properly constituted. He, therefore, recommended restoring the number of judges to seven, as was the case initially.³⁷

The tenure of the judges has also been reduced from five years renewable to four years non-renewable.³⁸ Among regional and international courts worldwide, there is no comparable abridged judicial tenure like that for

²⁹ Ugokwe (n 26 above) para 32.

³⁰ Ebobrah (n 13 above).

³¹ As above.

³² As above.

³³ 2006 Supplementary Protocol A/PS.2/06/06, art 2.

³⁴ Ebobrah (n 13 above) 10. See also Addadzi - Koom (n 3 above) (where concerns about the depth of the court’s jurisprudence on decisions affecting human rights were raised).

³⁵ Community Court of Justice ‘Membership of the court’ <http://www.courtecowas.org/members-of-the-court/> (accessed 25 August 2022). See Protocol A/P1/7/91 art 3(2) on the initial composition of seven judges.

³⁶ Speech delivered by Asante (n 6 above).

³⁷ As above.

³⁸ Community Court of Justice (n 35 above). Speech by Asante (n 6 above). See 2005 Supplementary Protocol art 2 on the initial five-year renewable tenure.

the ECOWAS Court's judges. According to President Asante, the limited judicial tenure was modelled after that of the Commissioners of the ECOWAS Commission, which to him, is a wrong model to follow since the Commissioners are political appointees while the judges are not.³⁹ The current judicial tenure model 'leads to the complete loss of institutional memory'.⁴⁰ A substantial part of consolidating the Court's jurisprudence is to ensure the longevity of judges on the bench enough to develop it over time. Thus, cutting short the tenure of the judges means different ideological thinking is introduced to the bench so quickly and so often that it may paint the picture of a bench that does not have a mind of its own.

3.4 No exhaustion of local remedies: A double-edged sword

The open doors of the ECOWAS Court, by waiving the exhaustion of local remedies, is a double-edged sword. On the positive side, it opens up the Court to ECOWAS citizens as a court of first instance so that victims of human rights violations can bypass national judicial systems that are ineffective in accessing justice. On the other hand, excluding the rule on exhausting local remedies opens the floodgates for a host of human rights cases that eventually inundate the court and affect quality assurance. As mentioned earlier, about 90% of the cases before the Court so far are human rights cases,⁴¹ yet there are only five judges (three sitting at a time) who may not all have the requisite international human rights qualifications. Consequently, the increasing number of cases will tire out the few judges. In their bid to close classes early, coupled with their possibly limited human rights expertise, they may sacrifice the quality of judgments and supporting jurisprudence of those decisions. Some scholars also believe that the non-exhaustion rule is probably why there is low state compliance with the Court's decision because it allows individuals to bypass the state's court system, explained later in this part.⁴²

3.5 No legal aid/assistance

Since the ECOWAS Court was initially set up to handle economic matters within states and not human rights matters where individuals could bring an action, no legal aid scheme or unit was attached to the Court. However, victims of human rights violations against the state often have financial constraints and would immensely benefit if there were some legal aid schemes available for them.⁴³

3.6 Low compliance rate

There is evidence of a low compliance rate with the ECOWAS Court's decisions among the Member States. The compliance rate as of May 2022 was 30 per cent.⁴⁴ The 2005 Supplementary Protocol requires the Member States to appoint or create a competent national authority to receive, process, and execute the ECOWAS Court's judgments. Yet, at the time of writing, only six Member States have such a competent national authority to enforce the Court's decisions. The six are Ghana, Guinea, Nigeria, Burkina Faso, Togo, and Mali.⁴⁵

The low compliance rate with the Court's decisions is essentially a symptom of the structural and procedural flaws of the Court discussed above. A sub-regional court that waives the exhaustion of local remedies rule has no

³⁹ Speech by Asante (n 6 above).

⁴⁰ As above, 58.50 minutes.

⁴¹ Awuni (n 2 above).

⁴² ECOWAS Court 'Political surveillance and judicial sanctions, panacea to low enforcement of judgments of ECOWAS court- law lecturer' <http://www.courtecowas.org/2022/05/14/political-surveillance-and-judicial-sanctions-panacea-to-low-enforcement-of-judgments-of-ecowas-court-law-lecturer/> (accessed 1 September 2022).

⁴³ Eboerah (n 13 above).

⁴⁴ Speech by Asante (n 6 above).

⁴⁵ As above.

properly defined legal relationship with the national courts of its Member States but expects its decisions to be enforced ‘according to the rules of the civil procedure of that Member State’,⁴⁶ low compliance with its decisions is hardly surprising. To begin with, so far as litigants are concerned, the ECOWAS Court and the national courts of Member States share jurisdiction since they can elect which of the two to file their human rights violation claims.⁴⁷ Where litigants elect to send matters to the ECOWAS Court at first instance, national courts may consider it overreaching and resist by (a) not giving ‘domestic judicial backing’ to the ECOWAS Court’s decisions; (b) giving decisions parallel to that of the ECOWAS Court (especially for the common law jurisdictions), and (c) simply ignoring the ECOWAS Court’s decisions.⁴⁸ Thus, it is important to establish a functional legal order between the ECOWAS Court and national courts.

3.7 Judicial sanctions undefined

To enforce compliance with the decisions of all political and judicial institutions of the ECOWAS, including the ECOWAS Court, the Council of Ministers in 2011 came out with the *Supplementary Act on Sanctions* against Member States that fail to honour their obligations to ECOWAS.⁴⁹ The Supplementary Act provides for judicial and political sanctions. However, while there is an extensive definition of what constitutes political sanctions,⁵⁰ there is only one terse provision on judicial sanctions, which provides no definition. Article 5 of the Supplementary Act on judicial sanctions provides:

The Court of Justice may deliver judgments sanctioning Member States for failure to comply with their obligations under the Treaty, the Conventions and Protocols, Regulations, Decisions, and Directives of ECOWAS.

Are judicial sanctions equated with the Court’s judgments, or are the judgments only a means to deliver the sanction? What is the nature of judicial sanctions anticipated? Can the courts impose some political sanctions? If so, to what extent can these orders be exercised? Following the above provision, the subsequent provision in the Supplementary Act on judicial sanctions is to say that ‘the sanctions defined in Articles 5 [judicial sanctions] to 11 [political sanctions] of this Supplementary Act shall be enforced in gradual or cumulative manner’.⁵¹

It is difficult to determine how an undefined (judicial) sanction could be gradually and cumulatively implemented. Also, the provisions on the modalities for implementing the sanctions in the Supplementary Act are skewed toward political sanctions. The process of sanctioning a state may be initiated by the decision of the Authority of Heads of State and Government either at a Member States’ request or the President of the Commission’s recommendation.⁵² Nowhere in the process is the ECOWAS Court mentioned. Therefore, even if the Court should impose a sanction, it is unclear how that sanction will be implemented. The silence of the Supplementary Act on the nature and modalities for implementing judicial sanctions exacerbates the low compliance rate that the Court is already grappling with.

⁴⁶ 2005 Supplementary Protocol (n 11 above) art 6(2).

⁴⁷ Ebobrah (n 13 above).

⁴⁸ As above 15.

⁴⁹ Supplementary Act A/SP.2/08/11.

⁵⁰ See articles 6, 8-12 of the 2011 Supplementary Act defining multiple political sanctions, including suspension from the participation in ECOWAS activities, travel ban on leaders, their families, and associates, recall by the other Member States of their Ambassadors accredited to a country, an embargo on arms entering a Member State and ban on standing for presidential office in the Member States.

⁵¹ Supplementary Act (n 49 above) art 13.

⁵² As above arts 14 – 20.

4. Prospects

The ECOWAS Court has been heralded as ‘a pacesetter among regional courts in Africa’ because of its successes in building human rights jurisprudence on the continent and advancing the protection of the human rights of West Africans.⁵³ In March 2022, the Court's outstanding work in human rights was recognised when Columbia University in the United States awarded it the Global Freedom of Expression Award.⁵⁴ The Court received the award for its 2020 landmark decision in *Amnesty International & Ors v. The Togolese Republic*.⁵⁵ In that case, the Court found the Togolese government liable for violating the applicant's freedom of expression when it shut down the internet in 2017 during a protest. The Court classified access to the internet as a derivative right that facilitates freedom of expression, so it warrants legal protection. In August 2022, the ECOWAS Court received another international recognition through its President, Justice Asante, who was awarded the African Bar Association (ABA) Medal of Merit in Leadership for being instrumental in leading the Court to deliver outstanding judgments.⁵⁶ Having the Court's name and work gain global recognition sets it up as an exemplar. It enhances its popularity, particularly among West Africans, who may consider it a preferred destination for international human rights litigation against the state.

Apart from the international accolades the ECOWAS Court has attracted for its excellent work, the number of cases before the Court keeps increasing rapidly, partly because it does not require the exhaustion of local remedies. As of November 2021, there were 540 cases before the Court, of which it had resolved 130 – mostly human rights cases.⁵⁷ The Court is arguably the most active African human rights court and a haven for victims of human rights violations in the ECOWAS community.

In 2020, to offset the laggard court proceedings that came with the COVID-19 pandemic, the ECOWAS Court instituted an electronic case management system that allowed for virtual court hearings.⁵⁸ Incorporating technology in the Court's delivery of justice is likely to open up the court to specific groups of human rights litigants who hitherto may not have been able to bring an action to the court due to financial, travel, and other logistical constraints. Through virtual hearings, victims of human rights, especially those outside of Nigeria, may be able to stay in the comfort of their homes and participate in the court proceedings without traveling to Abuja, Nigeria, where the ECOWAS Court is situated. The convenience and cost-saving virtual hearing bring to litigants could further boost the ECOWAS Court's appeal to West Africans. Suppose virtual hearings are appropriately harnessed so parties can participate in a trial from start to finish remotely. In that case, it will further advance the Court's prospect as Africa's top human rights court.

Before the pandemic, the ECOWAS Court had been engaging in an itinerant exercise that brought the Court home to its users by moving from Member State to Member State over time.⁵⁹ This exercise which started in 2007 in Mali,⁶⁰ subject to some modifications, could also promote the Court's prospects as the continental lead in

⁵³ Speech by Asante (n 6 above) 56.58 minutes.

⁵⁴ Columbia University 'Global freedom of expression' <https://globalfreedomofexpression.columbia.edu/prizewinners2022/> (accessed 6 September 2022).

⁵⁵ ECW/CCJ/JUD/09/20.

⁵⁶ Ghana News Agency 'ECOWAS court president honoured by African Bar Association for outstanding leadership' <https://gna.org.gh/2022/08/ecowas-court-president-honoured-by-african-bar-association-for-outstanding-leadership/> (accessed 6 September 2022).

⁵⁷ Speech by Asante (n 24 above).

⁵⁸ ECOWAS Court (n 5 above).

⁵⁹ Awuni (n 2 above).

⁶⁰ As above.

adjudicating human rights. The most recent session was held in Ghana between 21 March and 1 April 2022, where the Court expected to hear some 60 cases and deliver 25 judgments.⁶¹ The idea of an itinerant ECOWAS Court caters to the shortcomings of the virtual court in that litigants excluded from virtual hearings due to poor internet connection, or lack of technological know-how can litigate in person in their home country.

Undoubtedly, the ECOWAS Court has excellent prospects of becoming the number one human rights court across Africa and globally by leveraging its burgeoning international reputation, flexible locus standi, virtual court system, and itinerant court activities along with other relevant recommendations. Based on the discussions, the following section highlights some recommendations that would propel the ECOWAS Court to effectively administer justice in human rights cases and boost its exemplary status in and out of Africa.

5. Recommendations

The following recommendations would advance the ECOWAS Court's effective execution of its human rights mandate:

a. Restructure the court to fit its human rights mandate.

The ECOWAS Court needs substantial restructuring to accommodate the human rights mandate conferred on it entirely. Multiple alternatives could be explored. First, suppose the current unified Court structure is to be maintained such that it exercises its human right and economic mandates in the same stream. In that case, the Court could have two divisions – a First Instance Division and an Appellate Division, as in the East African Court of Justice (EACJ).⁶² These divisions would establish a functional legal order that incorporates international human rights principles of subsidiarity and complementarity so the ECOWAS Court can serve as both a Court of first instance and an Appeal Court.

Alternatively, the Court's current structure may be overhauled and re-modelled to have a separate Human Rights Court. The Human Rights Court may then have a First Instance Division and an Appellate Division or operate as a single unit with both first instance and appellate jurisdiction. Operating as a single Human Rights Court with concurrent first instance and appellate jurisdiction would mean redefining its human rights mandate through a Protocol for the Human Rights Division of the Court. This Protocol would also consolidate all existing rules on the Court's human rights mandate scattered in the Court's decisions and supplementary protocols, including the applicable international human rights instruments currently.

Another model could be to follow the African Court model, where the African Court on Human and Peoples' Rights (ACHPR) co-exists with the African Commission on Human and Peoples' Rights.⁶³ Thus, an ECOWAS Human Rights Commission could be clothed with powers to handle human rights cases in complementarity with the ECOWAS Court's human rights mandate. Separate protocols to regulate these two bodies will be necessary for smooth implementation.

⁶¹ As above.

⁶² Treaty for the Establishment of the East African Community (As amended on 14 December 2006 and 20 August 2007) art 24(2).

⁶³ See chapter 2, rules 34 to 38 of the 2020 African Court on Human Peoples Right Rules of Court on the complementarity between the ACHPR and the Commission. Rules of Procedures of the African Commission on Human and Peoples Rights part IV rules 114-123.

b. Inclusion of international human rights as a judicial qualification

The paper spotlighted the omission of international human rights expertise or working knowledge as a requisite qualification for the ECOWAS Court judges. As soon as is practicable, the 2006 Supplementary protocol must be amended to include competence and expertise in international human rights law as a judicial qualification to enhance and deepen the Court's human rights jurisprudence going forward.

c. Increase the number of judges

There have been calls for the number of judges at the ECOWAS Court to be restored to seven instead of the current number of five.⁶⁴ Increasing the number to seven will allow the Court to split into two chambers to adjudicate cases speedily. I argue for further increasing the number of judges to about ten so that three chambers can run concurrently to triple the Court's current rate of justice delivery. At the EACJ, although there are currently 11 judges, the maximum number of judges is set at 15 (ten at the First Instance Division and five at the Appellate Division).⁶⁵ Instead of setting a cap on the number of judges like the ECOWAS Court and the EACJ, the Southern African Development Community (SADC) Tribunal sets a minimum number of ten judges who work on a part-time basis until such a time when the President of the Tribunal recommends that the Tribunal's workload requires working full-time.⁶⁶ The SADC Tribunal judges are divided into 'regular judges' who sit on the Tribunal regularly and non-regular judges who 'constitute a pool from which the President may invite a Judge to sit on the Tribunal whenever a regular Judge is temporarily absent or is otherwise unable to carry out his or her functions'.⁶⁷ At the ACHPR, there are 11 judges; one (the Court President) is full-time, and the other ten are part-time.⁶⁸ Should the ECOWAS Court increase the numbers beyond seven, it could consider a similar arrangement to the SADC Tribunal and set a minimum number of judges to ten rather than putting a ceiling on the number. Additionally, the ECOWAS Court could follow in the footsteps of the SADC Tribunal and the ACHPR to make about 60% of the judges work on a part-time basis so that the financial burden of full-time engagements is reduced while achieving high levels of productivity.

d. Extend the tenure of judges

Another recommendation has been to restore the judges' tenure to the initial five-year renewable term to enable the court to establish institutional memory. In considering a tenure extension, lessons can be drawn from other supranational courts on the continent. For example, judges at the ACHPR have a six-year tenure renewable only once.⁶⁹ At the SADC Tribunal, there is a five-year renewable judicial tenure.⁷⁰ The EACJ offers judges a seven-year non-renewable term.⁷¹ I recommended that the ECOWAS Court adopts the six-year tenure renewable of the ACHPR because the court is a human rights court, unlike the EACJ, which is not, and the SADC Tribunal, which minimally adjudicates human rights cases compared to the ECOWAS Court.

⁶⁴ Speech by Asante (n 6 above). Speech by Asante (n 24 above).

⁶⁵ EACJ Treaty art 24(2).

⁶⁶ Protocol on the Tribunal in the Southern African Development Community article 3(1).

⁶⁷ SADC Tribunal Protocol art 3(2).

⁶⁸ 'African Court on Human and Peoples Rights' <https://www.achpr.org/afchpr/> (accessed 7 September 2022).

⁶⁹ As above.

⁷⁰ SADC Tribunal Protocol art 7(1). The tenure is renewable only once.

⁷¹ EACJ Treaty art 24.

e. Reconsidering the non-exhaustion of local remedies rule

The non-exhaustion of local remedies rule at the ECOWAS Court is well-intentioned and arguably one of the main reasons the Court is increasingly receiving human rights cases, but this open-door policy could also be problematic, as earlier pointed out. Consequently, some modifications are necessary. Two alternatives could be considered. First, the rule could be maintained but subject to properly defining a functional legal order of subsidiarity and complementarity between the ECOWAS Court and national courts and restructuring the Court to have first instance and appellate divisions. With such an arrangement, first instance litigants will have the opportunity to appeal instead of having no other international remedy after the first decision.

Second, the non-exhaustion rule could be made conditional. The condition could be that where individuals bring human rights cases to the court at first instance, the ECOWAS Court could defer to the national court concern to attempt hearing the case subject to the local remedies' availability and efficiency, failing which the ECOWAS Court would proceed with the matter.⁷² The ECOWAS Court may give a reasonable time frame for the national court to remedy the violation. The difference between this proposed conditional exhaustion rule, the current non-exhaustion rule, and the exhaustion rule is that (a) the conditional rule only stays proceedings, respects the subsidiarity principle, and does not insist on exhausting all local remedies but only a first local attempt; (b) the current non-exhaustion rule disregards the subsidiarity principle and accepts all eligible cases without question; and (c) the exhaustion rule outrightly rejects the matter for want of exhaustion of all local remedies, respects the subsidiarity principle but does not engage with the national court involved.

f. Provision for legal aid/assistance

The importance of establishing a legal aid or assistance unit at the ECOWAS Court cannot be over-emphasized. At the ACHPR, free legal representation is available to parties who may need it at their request or by the Court *suo motu*.⁷³ The ECOWAS Court must follow this example to make its justice delivery in human rights matters holistic. The force of the law should also back it as with the ACHPR. Therefore, the Protocol for the ECOWAS Court should be amended to make provisions for legal aid and assistance.

g. Monitoring Compliance

Low compliance was another bane of the ECOWAS Court. Compliance rather than the number of cases the Court receives, and closes is a better measure of the Court's success. Therefore, attention must be given to ensuring compliance with the court's decisions. As mentioned earlier, compliance is inextricably linked with restricting the Court. Once the Court's structure establishes a functional legal order and institutes a well-thought exhaustion rule, a considerable part of the compliance problem will be solved. Additional measures that can be taken are as follows. First, efforts to persuade the remaining states yet to appoint a national enforcement authority should be increased. A way to do this is for the ECOWAS Court to liaise with the Commission to send ECOWAS missions to those states, deeply engage with them, and, where possible, assist the governments of such states to publicly name or declare an intention to establish such national authorities. Another will be for the Court's next series of itinerant exercises to target the non-compliant Member States. The physical presence of the Court in such countries could perhaps compel them to do the right thing as host nations.

⁷² Ebobrah (n 13 above).

⁷³ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and People's Rights art 10(2). Rules of Court, African Court on Human and People's Rights, 2020 rule 31

Second, the restructuring of the ECOWAS Court could take after the complementarity model between the ACHPR and African Commission earlier indicated. Non-compliance with the recommendations of the African Commission may be referred to the ACHPR for a binding decision.⁷⁴ Where an ECOWAS Human Rights Court and an ECOWAS Human Rights Commission co-exist, the two-tier compliance strategy between the Commission and the Court would be helpful. See below:

Third, studies have also revealed a connection between follow-up mechanisms and increased state compliance. At the African Commission, Louw found that most of the sample cases that fully complied with the Commission had consistently followed up on the Member States involved to implement its recommendation.⁷⁵ The converse was also true for instances of non-compliance.⁷⁶ The follow-up procedure for the African Commission is outlined in its 2010 Rules of Procedure⁷⁷ and updated in its 2020 Rules of Procedure.⁷⁸ The follow-up process, among other things, involves (a) parties writing to the Commission after 180 days of its decision steps being taken to implement the decision, the received report is given to the other party to comment on it; (b) requesting an affiliate national or specialized human rights institution to report on any steps taken to monitor and facilitate implementation by the State Party; (c) sending reminders to States Parties to report on their progress with implementation; (d) designating a Rapporteur to assist with monitoring compliance; (e) public reporting by the Commission on the implementation of its decisions at every Ordinary Session; (f) referring possible non-compliance issues to the appropriate African Union policy organ; and (g) update report on the status of implementation of its decision in its bi-annual Activity Report.⁷⁹ The ECOWAS Court should institute a similar follow-up mechanism, especially involving external players such as affiliate national or specialized human rights institutions (having special observer status with the ECOWAS Court), Rapporteurs, and a higher executive or political body such as the ECOWAS Commission. Partnering with such parties will share the burden and enhance compliance.

Finally, the ACHPR adopts diverse procedures to monitor compliance with its decisions, some like that of the African Commission. The measures include (a) States Parties' submission of reports on compliance with the Court's decision and applicants' observations about the report; (b) obtaining information about State Parties' compliance from other credible sources for assessment purposes; (c) organizing hearings to assess the status of compliance with its decisions where a dispute arises regarding the compliance, and (d) reporting non-compliance to the AU Assembly.⁸⁰

Monitoring and ensuring compliance with the ECOWAS Court's decision will require adopting multiple approaches instead of the heavy reliance on Member States' appointment of a competent national authority and adherence to their civil procedure for enforcing judgments. The examples of the ACHPR and the African Commission's compliance strategies offer helpful alternatives that hold the promise of boosting compliance with the decisions of the ECOWAS Court.

⁷⁴ 2020 ACHPR Rules of Court (n 73 above) rule 36. Tarisai Mutangi 'Enforcing compliance with the judgments of the African Court on Human and Peoples' Rights: Prospects and challenges' in Aderomola Adeola (ed.) *Compliance with international human rights law in Africa: Essays in honour of Frans Viljoen* (2022) 183.

⁷⁵ *Lirette Louw* 'Member states' compliance with the recommendations of the African commission on human and peoples' rights' in Aderomola Adeola (ed) *Compliance with international human rights law in Africa: Essays in honour of Frans Viljoen* (2022) 149.

⁷⁶ As above.

⁷⁷ Rules of Procedure of the African Commission on Human and Peoples' Rights, 2010 rule 112.

⁷⁸ Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020 rule 125.

⁷⁹ As Above.

⁸⁰ 2020 ACHPR Rules of Court (n 73 above) rule 81.

h. Defining Judicial Sanctions

As mentioned earlier, the *Supplementary Act on Sanctions* does not properly define judicial sanctions and how they operate. Therefore, I recommend that the ECOWAS revisits the Supplementary Act to provide a clear and detailed definition of what judicial sanctions are, what they entail and how they work. A detailed definition for judicial sanctions should incorporate a name and shaming measure where the Court would periodically release a report or a list of non-compliant Member States. Defaulting Member States could be referred to the ECOWAS Commission, which may trigger some political sanctions where necessary. Nyinevi recommends contemporaneously using judicial sanctions and political surveillance mechanisms for a more significant compliance effect.⁸¹

6. Conclusion

This paper had a two-fold goal: to identify the challenges facing the ECOWAS Court in adjudicating human rights and highlight the Court's prospects that can be harnessed for greater impact in international human rights adjudication. Challenges discussed include the old wine, the new wineskin phenomenon that characterises the Court's current structure and human rights mandate, judges' limited qualifications, the low numbers of judges and lean judicial tenure, the double-edged nature of the no exhaustion of local remedies rule, the lack of legal aid, and the high non-compliance rate. Despite these challenges, the paper observed some prospects - its burgeoning international reputation, flexible locus standi, the virtual court system, and itinerant court activities - which, if properly exploited, could advance the ECOWAS Court's regional impact on human rights. The paper also made several recommendations. It argued for restructuring the Court to make it consistent with its human rights mandate. It also argued for including competence in international human rights as a judicial qualification, increasing the number of judges, extending judges' tenure, taking a second look at the non-exhaustion of local

⁸¹ ECOWAS Court (n 42 above).

remedies rule, providing for legal aid, boosting its compliance monitoring mechanisms and clearly defining judicial sanctions in the Supplementary Act on Sanctions. In making these recommendations, I drew from other African regional and sub-regional examples, which serve as a blueprint for repositioning the ECOWAS Court to fit its human rights mandate. Currently, the ECOWAS Court is arguably the leading sub-regional court in human rights on the continent. These recommendations will amplify the Court's human rights endeavours if considered and implemented, creating a legacy as the most outstanding exemplar in Africa and beyond.

